Supreme Court, U.S.
FILED
SEP 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL APPENDIX

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September 1989

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APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 87-2068-Mc

UNITED STATES OF AMERICA,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant.

MEMORANDUM AND ORDER

May 16, 1988

Mc NAUGHT, D. J.

This action comes on to be heard on defendant General Motors' ("GM") motion to dismiss or, in the alternative, for summary judgment. Since affidavits and other documents outside the pleadings have been presented, we treat the matter as a motion for summary judgment. The issue before us is the Environmental Protection Agency's ("EPA") enforcement authority under the Clean Air Act (the "Act"), 42 U.S.C. § 7401 *et seq.*

The Clean Air Act provides for the EPA to establish National Ambient Air Quality Standards ("NAAQSs") which States must meet by specified deadlines. 42 U.S.C. § 7409. The states, in turn, are responsible for devising State Implementation Plans ("SIP") which regulate the specific details of how implementation is to be achieved. These SIPs must be submitted by the state to the EPA for approval. 42 U.S.C. § 7410. Then, by the terms of section 7410(a)(2):

> "The Administrator shall, within four months after the date required for submission of [the SIP], approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan . . . if he determines that it was adopted after reasonable notice and hearing and that [certain other criteria are met]."

Once the SIP has been approved by the EPA, it is enforceable under both State and federal law.

The original SIP is not necessarily the final word, however. Under 42 U.S.C. § 7410(a)(3)(A), the state may submit revised SIPs to the EPA for approval.

> "The Administrator shall approve revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and hearing."

The heart of the issue before us is whether this provision requires the EPA to approve or disapprove proposed SIP revisions within four months as is the case for original SIPs.

The facts before us are as follows: In February, 1979 the EPA promulgated NAAQSs having to do with photochemical oxidants, including ozone. One of the industries affected by these NAAQSs was the GM Plant in Framingham, whose painting facilities emitted volatile organic compounds ("VOCs") which react with the atmosphere to create ozone.

Later that year, the Massachusetts Department of Environmental Quality Engineering ("DEQE") submitted a proposed SIP which included provisions regulating VOC emissions from automobile surface coating operations. 310 CMR 7.18(7). GM's Framingham plant is the only such facility in the Commonwealth. EPA approved this regulation in 1980. 45 Fed. Reg. 61293, 61295. This SIP required GM to meet

compliance regulations in stages, with full compliance by December 31, 1985, some two years earlier than the maximum time allowed by the NAAQS.

In October 1981, the EPA published a policy statement which acknowledged a shift in automobile painting technology from the older lacquer-based process to a new basecoat/clear coat ("BC/CC") process, which would eliminate many prior pollution problems. 46 Fed. Reg. 51366. This statement provided that the EPA would allow revisions of SIPs which gave automakers until 1986 or, in some cases, 1987 to shift to the BC/CC process. *Id.* at 51367.

In November 1984, GM submitted a proposed compliance schedule to DEQE. This schedule related to the lacquer operations which were still in use at Framingham, and asked for an extension of time, beyond the end of 1985, to install the necessary emission controls. By June, 1985, however, GM had indicated its plans to convert the Framingham plant to the BC/CC process. This conversion was expected to take until the end of 1987. On December 30, 1985, the day before the final compliance deadline under the original SIP, DEQE proposed a revised SIP which would give GM until August 31, 1987 to comply with the NAAQS.

To make an already long story shorter, GM began construction of a new $200 million BC/CC facility while continuing its out-of-compliance (under the original SIP) lacquer operations. For its part, EPA Region I conducted negotiations with GM and DEQE on the matter, but with no satisfactory resolution. According to the affidavit of John L. Hamisch, the Chief of the State Air Programs Branch of EPA Region I, on May 30, 1986 Region I was prepared to send a proposed disapproval of the revised SIP to EPA Headquarters, but delayed this action at DEQE's request. The proposed disapproval did go to EPA Headquarters on July 2, 1986. Final decision on the matter has yet to take place as the paperwork has floated about the EPA.

Notwithstanding this, in August 1986 the EPA issued a "Notice of Violation" to GM based on the requirements of the original SIP, and on August 17, 1987, the United States brought this action. GM's new BC/CC plant was completed in July 1987, the lacquer plant closed permanently, and since that time GM has been in compliance with all applicable NAAQSs.

The issue before us—whether or not the provisions of section 7410(a)(3)(A) incorporate the four month deadline of section 7410(a)(2)—is an open question in this Circuit. As conceded by the government, however, the weight of authority is that it does. The most recent case to address the subject is *United States v. Alcan Foil Products, et al.*, (C.A. No. 87-0434 L (CS), W.D. Ky., March 15, 1988).

Alcan also involved SIPs and proposed SIP revisions dealing with VOC emissions, in that case from rotogravure printing presses. The facts are quite similar to those before us. The EPA approved the pertinent original SIP in 1981. In 1984 the EPA approved an initial revision of the SIP. In March of 1986, however, a second revision was proposed. Just over four months later, without taking action on the proposed SIP revisions, EPA served Alcan with a noncompliance notice. A year and one day later, having notified Alcan of perceived obstacles to approval of the proposed SIP, but not yet having acted upon it, EPA filed suit. As of the date of the *Alcan* decision, more than two years from the time Kentucky had proposed its revised SIP, the EPA had not yet acted.

The *Alcan* court relied heavily on the other principal case in this area, *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987). As in *Cyanamid*, the court held that although the EPA had the authority to reject the proposed SIP and to enforce the old standard from that point on, it could take no enforcement action until then. *Alcan* at 4.

Any other result makes little sense from a practical standpoint. The very structure of the Clean Air Act describes a

cooperative venture in which federal authorities prescribe long-term national standards but allow each state, within limits, to determine the best way to reach them. *Cyanamid* at 500. Indeed, the language of section 7410(a)(3)(A) is such that

> "[t]he Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met . . . [S]o long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission standards it deems best suited to its particular situation."

Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 79 (1975).

Were we to accept the government's interpretation of section 7410(a)(3)(A) the role of the states in this cooperative venture would be severely curtailed. Clearly, one of the reasons the states were authorized to propose revisions to SIPs is that they are closer to the problems and, therefore, better able to determine the best interests of their citizens and state industries in achieving the mandatory federal standards. A system which would allow EPA to proceed indefinitely without accepting or rejecting the state's plan, while at the same time enforcing the previous law, would put all the cards in federal hands. This is clearly contrary to the intent of the statute.

The United States makes much of the idea that proposed SIP revisions are different from original SIP proposals. This is so in part, they argue, because the groundwork for many original SIPs was already in place and because there was a

need, initially, to get up to speed in Clean Air Act enforcement. In addition, SIP approval was necessary before any of EPA's other activities could begin, whereas proposed SIP revisions must compete with other EPA priorities. Consequently, the government insists, "EPA [should be] entitled to a reasonable time for action on proposed SIP revisions submitted by the statutes, not constrained by the four-month period for decisions on original SIPs." (Plaintiff's Brief at 21).

We agree that the EPA should have a "reasonable" time to review and act upon proposed SIP revisions. As it is, we believe that the four month period which the *Alcan* and *Cyanamid* courts have agreed upon meets this standard. *Accord Duquesne Light Co. v. EPA*, 698 F.2d 456 (D.C. Cir. 1983); *Council of Commuter Organizations v. Thomas*, 799 F.2d 879 (2d Cir. 1986); *Council of Commuter Organizations v. Gorruch*, 683 F.2d 648 (2d Cir. 1982). *Contra United States v. National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985). This is so for a number of reasons.

First, the EPA always holds the ultimate trump card: it may at and time during or after the allowed four month period reject the proposal and invoke enforcement proceedings under the original SIP. Second, it strains credulity that truly important or controversial SIP revisions cannot be effectively identified early on in the process and scheduled for expedited review. This is especially so since SIP revisions will seldom be breaking "new ground," but will merely modify already approved procedures. Third, a period any greater than four months would leave both the states and the affected industries in an unjustifiable state of limbo. For an indefinite period, the state would be unable to act to balance dictated national priorities with the interests of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would in some instances face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later. Although it is not likely

that such fines in Framingham would force GM to bankruptcy, that would be cold comfort to Framingham workers who might be laid off while a new plant was being built or because the plant was moved out of state.

The provisions of 42 U.S.C. § 7410(a)(3)(A) do not call for that choice. We agree with the *Alcan* and *Cyanamid* courts and others that the statute parallels the provisions of section 7410(a)(2) in providing EPA with four months to render a decision on proposed SIP revisions. If a decision is delayed beyond that time, the EPA is prohibited from bringing or continuing enforcement proceedings under the original SIP until final action is taken.

The proposed SIP revision in issue here went to EPA nearly two and one-half years ago, and final action has yet to be taken. In the meantime, GM has built a brand new $200 million facility, shut down permanently the offending lacquer plant, and come into full compliance with the ozone NAAQSs. For EPA to complain at this point that it was not given "reasonable" time to act smacks of closing the barn door after the horse is already out. If the EPA is to achieve its stated objective in the future, it will have to get the door closed faster.

For all of the above reasons, defendant's motion for summary judgment is GRANTED.

SO ORDERED.

JOHN J. Mc NAUGHT
UNITED STATES DISTRICT JUDGE